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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CITY OF YONKERS,

Petitioner,

vs.

UNITED STATES; YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 31, 1991

Questions Presented

1. When a city's obligation to provide sites for public housing is embodied in a consent decree, and the decree also requires the city to waive any further appellate review of orders that relate to the obligation to provide sites, does the waiver validly operate to prohibit appellate review of a subsequent order involving a modification or expansion of the original decree obligation?

2. Does a district court abuse its equitable discretion by requiring a city to transfer fee simple title to five public housing sites to a nonparty developer that will construct public housing on the sites when the district court refuses to make that transfer subject to a protective right of reverter to the city in the event the sites are no longer used for public housing?

3. Does a district court abuse its equitable discretion when it modifies and expands a city's obligations as set forth in the consent decree without any notice or demonstration of a factual need for the modification in an evidentiary hearing?

Parties to the Proceedings Below

I. Active in this aspect of the litigation:

United States
Yonkers Branch, National Association for the Advancement of Colored People
City of Yonkers
U.S. Department of Housing and Urban Development

II. Not active in this aspect of the litigation:

Yonkers Board of Education
Yonkers Community Development Agency
State of New York, its Governor, and various other state officials

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Yonkers, a New York municipal corporation, respectfully prays that the Supreme Court grant a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit entered on March 4, 1991 (appeal no. 90-6257) and March 19, 1991 (appeal no. 91-6022).

OPINIONS BELOW

This petition seeks review of two related judgments of the Second Circuit arising out of the ongoing remedy proceedings in the *United States v. Yonkers* litigation. The decision of the Second Circuit Court of Appeals in appeal number 90-6257 is reported as *United States v. Yonkers Board of Education*, 927 F.2d 85 (2nd Cir. 1991). The Second Circuit dismissed appeal number 91-6022, without opinion. See, App. A-60.[1]

None of the various orders of the district court which are the subject of this appeal are reported. Each is reproduced in the Appendix to this petition. See, App. A-30, 35, 38, 50.

JURISDICTION

The Second Circuit Court of Appeals affirmed the district court's orders in appeal number 90-6257 on March 4, 1991. App. A-53. The Court of Appeals dismissed appeal number 91-6022 on March 19, 1991. Appendix A-60.

This Court has jurisdiction to consider this petition pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions and statutes involved are the Fourteenth Amendment to the Constitution of the United States and the Fair Housing Act of 1968, 42 U.S.C. 3604. (1977) App. A-63.

STATEMENT OF THE CASE

The City of Yonkers ("City") seeks review by this Court of the decisions of the Court of Appeals for the Second Circuit on two appeals arising out of ongoing housing desegregation remedy proceedings. The City acknowledges this Court's familiarity with

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[1] The form of citation utilized in this petition is as follows: the Appendix to this petition is referred to as "App." Other record citations are included in the Joint Appendix for appeal 91-6022 in the Second Circuit and are referred to as "J.A."

the ongoing *Yonkers* litigation and the numerous appeals and collateral proceedings that case has spawned. Indeed, this Court reviewed and reversed the decisions of the lower courts imposing contempt sanctions on individual members of the elected government of the City of Yonkers in *Spallone v. United States*, 493 U.S. ____, 107 L.Ed.2d 644 (1990). The remedy orders of the district court are unique; and the implementation of those orders has often required adjustment and refinement as the process has gone forward. It is, therefore, not unexpected that these ongoing remedy proceedings and the attempts by a district court to remake the residential neighborhoods of a city of some 190,000 would engender a significant amount of reasonable debate and further litigation activity.

The two appeals at issue here involve implementation of the duty to provide sites for the construction of 200 public housing units on the east side of Yonkers. The City objected to various conditions and duties imposed on the City by the district court in the site transfer process. The Court of Appeals found that the City had no right to seek appellate review of *any* matter involving the public housing because the 1988 consent order designating the particular public housing sites for location of the 200 units included a waiver by the City that it would seek no further appellate review of the court's remedy order "to the extent it relates to the City's *obligation* to provide sites for the placement of 200 units of public housing . . ." (emphasis added). The appeals court held that the City had no right to appeal any order involving the public housing – even an order denying a modification of the existing public housing remedy orders. Such a decision is of significance not only to this litigation, but goes to the heart of the authority of district judges in supervising ongoing remedial orders. The notion that a party has no right to seek appellate review of a ruling on an effort to modify the prospective injunctive aspects of a consent decree is one which warrants correction by this Court.

A. The Remedy Orders.

On November 20, 1985, the U.S. District Court for the Southern District of New York, Leonard B. Sand, J., entered

its liability decision finding that the City engaged in unlawful discrimination in the selection of public housing sites and thereby promoted racial segregation in housing. In addition, the court found the City jointly liable with the Yonkers Board of Education for segregation in the public schools. *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985). The district court's remedy order for the housing portion of the case was entered on May 28, 1986. *United States v. Yonkers Board of Education*, 635 F.Supp. 1577 (S.D.N.Y. 1986) (hereinafter "Housing Remedy Order" or "HRO"); App. A-1. Those decisions were affirmed on appeal. *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988).

The HRO required the City to "submit" sites for 200 units of public housing for approval by the U.S. Department of Housing and Urban Development ("HUD"). HUD had previously agreed to fund the cost of construction of 200 units of public housing in a separate 1984 consent decree to which the City was not a party. Following over 18 months of site selection proceedings, the district court entered the First Remedial Consent Decree in Equity on January 28, 1988. App. A-21 ("1988 Decree").

B. The 1988 Consent Decree.

The 1988 Decree provides for further implementation of Parts IV and VI of the HRO.[2] App. A-21. Under the 1988 Decree, the "City agrees to provide the sites [identified in the Decree] for the location of a total of 200 units of public housing. . ." Decree § 2; App. A-22. The Decree then specifies the seven sites and proposed number of units for construction on each of the sites. Three of the sites were owned by the Yonkers Board of Education while the other four were privately held. Under the 1988

[2] Part IV of the HRO requires the provision of sites for 200 units of public housing while Part VI requires the City to adopt a long term plan for the development of additional assisted housing in nonminority neighborhoods. See, *Spallone*, supra, notes 1 and 2.

Decree, the City is required to "make fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 . . . " Decree § 4; App. A-23. The Decree required the City to condemn any sites it could not purchase:

> SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

App. A-23. The City's duty was to "acquire site control over all the sites referred to in Section 2 . . ." 1988 Decree, § 7; App. A-24. The decree did not specify the level of title to be obtained other than "site control" through eminent domain proceedings under state law.

In order to facilitate the construction of the public housing, a Request for Proposals ("RFP") for the construction of 200 units of public housing was to be issued by the Municipal Housing Authority ("MHA"). 1988 Decree, § 6; App. A-23, 24. The 1988 Decree required that the draft RFP should include preliminary reports on the suitability of all of the sites and the subsequent review of the sites by HUD. Those tasks were to be completed *before* issuance of a final RFP. *Id.* The RFP was to comply with HUD's guidelines and regulations as set forth in HUD Handbook 7417.1 REV-1 (October 1980), J.A. 42; see also HRO, section IV (comply with requirements for HUD Turnkey Contract) App. A-12; and, RFP at J.A. 222.

The 1988 Decree provided that the preferred development proposal would be selected by MHA and subsequently approved by HUD. 1988 Decree, § 8; App. A-24. The Decree made clear, however, that "HUD has not given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent

Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval." 1988 Decree, § 11; App. A-25. The City's right to challenge in court "discretionary decisions which HUD may make in making available the 200 units of public housing" was preserved. 1988 Decree, § 20; App. A-20. Hence, it was made clear in the 1988 Decree that the process of evaluation and approval of the sites was not complete at the time they were designated in the Consent Decree.

Section 10 of the Consent Decree made clear that the City would no longer pursue its right to appeal the court-imposed obligation to provide sites for public housing:

> SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America, et al. v. Yonkers Board of Education, et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein. App. A-25.

The MHA, with the approval of HUD and the district court, issued the RFP for 142 of the 200 units in December of 1988. J.A. 215. The development proposal of nonparty Deluxe Development of New York, Inc. ("Deluxe") was selected by MHA and approved by HUD.

C. The Title Orders — Appeal 90-6257.

On July 24, 1990, the district court entered its Order requiring the transfer to Deluxe of five sites for the construction

of 142 units. App. A-30. The court found that the City had pursued the state condemnation proceedings and acquired title to the five sites. App. A-31. As required by the 1988 Decree, the court ordered the City to convey the sites and, absent such action, title would be deemed vested in Deluxe pursuant to Rule 70, F.R.Civ.P., upon Deluxe's execution of a HUD Turnkey Contract in accord with the HRO and 1988 Decree. App. A-33. The district court then, *sua sponte*, imposed the following new obligations on the City that were not provided for in the 1988 Decree:

> 3) It is further ORDERED that the City shall condemn any private easements or covenants inconsistent with the use of any of the above-named properties for public housing;
>
> 3(A) It is further ordered that the City shall convey title to the above named properties free and clear of all liens, encumbrances and/or clouds on title;
>
> 4) It is further ORDERED that the conveyance or vesting as set forth herein shall be deemed by this Order to convey to and vest in Deluxe Development of New York, Inc. good and marketable title to each of the five above named properties; . . .

App. A-34. The City filed objections to the July 24 Order which the Court heard on July 31, 1990. J.A. 256. The district court entered another Order on August 2, 1990 further defining six specific new actions required of the City to partially comply with the affirmative obligation to remove the alleged encumbrances on title. App. A-36. These orders have been collectively referred to as the "Title Orders." The City's appeal from the Title Orders, Second Circuit number 90-6257, was argued and submitted before Chief Judge Oakes and Judges Cardamone and Walker of the Second Circuit Court of Appeals on January 17, 1991.

D. HUD's Problems With Deluxe.

Notwithstanding the provisions of the Title Orders placing additional obligations on the City to clear various encumbrances, HUD, MHA and Deluxe delayed execution of the Turnkey Contract for many months. The delays were apparently due to obstacles Deluxe was facing in obtaining financing and title insurance for the project. Under the RFP, Deluxe had the duty to obtain its own financing and title insurance.

The City endeavored to comply with the district court's August 2, 1990 Order to condemn the off-site covenants applicable to the Whitman site. Those covenants, derived from a 1955 deed, provided that the site could only be used for "single family detached" homes. The Deluxe proposal, developed after the 1988 Decree and approved by MHA and HUD, provided for attached units in apparent violation of the covenant.[3] A title insurer advised the City that the research necessary to commence a condemnation action to clear the covenants or liens against the Whitman and Helena sites[4] would take some eight to twelve months to complete at an estimated cost of $275,000.00. J.A. 345.

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[3] The deed includes no restriction against development of public housing on the sites. It only prohibits attached homes. J.A. 334.

[4] The Whitman covenants had been only recently discovered. They were not listed as an exception in a June 1987 report prepared for the Board of Education and furnished to the City. J.A. 365. Nor were the covenants mentioned in a January 4, 1988 report by Oscar Newman, the Court's Outside Housing Advisor ("OHA"), to Judge Sand and all parties. Newman's report found the Whitman site suitable for public housing. J.A. 373. In fact, Newman reviewed the 1987 title report and discussed the state of the title in his report to the court. J.A. 379, 380. Like the title company, Newman completely missed the covenant.

Newman and HUD have been aware for several years of the title defects in the Helena site due to a dedicated "paper" street through the site, but ultimately approved it notwithstanding those defects. J.A. 404, 405.

(Footnote continued)

On October 4, 1990, HUD gave Deluxe an ultimatum to sign a contract within five days. J.A. 477-78. Discussions continued and, on November 2, 1990, HUD advised, that it would accede to Deluxe's demands *if* the Court would assure HUD that "the City will be required [sic] reimburse HUD for any financial loss due to any defects in title, HUD . . . will agree to assume the risk of title deficiencies." Letter from HUD Assistant Secretary Schiff to Peter Smith of MHA, November 2, 1990; J. A. 475.

E. The Indemnity Orders — Appeal 91-6022.

On October 30, 1990, the district court signed an Order setting a status conference on all housing matters for November 7, 1990.[5] App. A-38. All parties were directed to make any necessary applications with as much advance notice as possible to all parties. *Id.* No party made any written application.[6]

Nor did HUD or MHA discover any title defects in the sites when they approved Deluxe's proposal, notwithstanding the requirements of HUD's guidelines that a proposal from MHA for HUD financing must include evidence of clear title for construction of public housing. HUD Handbook 7417.1 REV-1, page 6-16; J.A. 435.

On October 4, 1988, counsel for the NAACP recognized that "site control", as required by the HUD regulations and guidelines, was a prerequisite to the issuance of the RFP and would occur upon filing of the condemnation actions by the City in state court. J.A. 210. It was also recognized by the district court that the City's duty was to simply obtain "site control." See, J.A. 213 (court stated "the city will be ordered to obtain control of that site on penalties of contempt").

On March 8, 1990, HUD wrote MHA and advised it that the City's acquisition of the privately-held sites by eminent domain "constitutes the requisite information concerning title" required by HUD's guidelines. J.A. 438. HUD requested, however, title reports on the school sites — Whitman and School 4. The City promptly obtained title reports. J.A. 441-51. That was the first knowledge of the City and, presumably the other parties, of the restrictions on the use of the Whitman site.

[5] On November 6, the Court's Outside Housing Advisor notified the City that the hearing was delayed to November 8, 1990.

[6] The City has since learned of numerous ex parte communications preceding the November 8 hearing involving the Court's Outside Housing Advisor, Oscar Newman. Those activities are the subject of proceedings currently pending in the Court of Appeals. Second Circuit Appeal Number 91-6098.

Following a report on the Long Term Plan aspects of the HRO and 1988 Decree, and a further recess, the court requested a status report from the parties regarding the public housing. App. A-39. After announcing that it had "been advised that a consensus has been reached with respect to some of the problems which were perceived and some of the provisions to be set forth in the contract," the district court proceeded, *sua sponte*, to place new obligations on the City to "indemnify and save harmless" the parties involved in the development or operation of the public housing. App. A-41.

As counsel for the City began to explain the circumstances with respect to the Whitman and Helena sites, the district court interrupted and ordered: "it is the City's obligation, the City [is] already required to indemnify and save harmless HUD, MHA or anyone else should there be any damages or costs, including legal fees, incurred by virtue of any of these problems." App. A-41. There was no motion for such relief by any party.

The City objected to the indemnification as unnecessary. Moreover, the City had no knowledge of the possible terms of the contract between Deluxe and HUD – a contract which the City now would be indemnifying. The district court told the City it needed no more knowledge:

> The Court: The City of Yonkers need not concern itself with that. All the City of Yonkers need concern itself with is the fact that it, the City of Yonkers, will be liable, I will say it again – I don't have to say it again. The difficulties or the problems that may exist with the builder, with the bank, with anyone else are problems which Yonkers need not concern itself with.

App. A-44.

The City's attempt to demonstrate a more prudent and less draconian alternative to the Indemnification Order was summarily halted by the district court. No evidentiary hearing was held; no findings of fact were made. The result of the City's

summons to present the status of its efforts to clear title was an Indemnification Order expanding its role from a provider of sites to a guarantor of the then-unexecuted and partially negotiated contract between HUD, MHA and Deluxe, a nonparty.

The City's motion for relief from the November 8 Indemnity Order, J.A. 298, was heard by the district court on November 29, 1990. J.A. 646. At the hearing, the City suggested that the court consider alternatives to the indemnity obligations. The court made clear that it would not consider alternatives and that it would insist that the 200 units be built on the seven selected sites in the configuration and design proposed by Deluxe:

> THE COURT: Mr. DeRosa, I rarely say the question is foreclosed. Let me tell you that the question of whether it will be 200 units, the type of housing, the sites on which they are to be built, those are closed questions. In my view the amount of dollars which have been expended in the litigation over those issues, the time and energy which went into the resolution of those issues, exceeds even the wildest estimates, compared to —
>
> MR. DEROSA: I wouldn't agree with your Honor.
>
> THE COURT: You are free not to.
>
> MR. DEROSA: The point I was making there is that at some point the costs become unbearable.
>
> How we got here I think is now largely maybe moot. We talked a little bit about it. We think the City got here by relying on a title report which, rightly or wrongly, disclosed no restrictive covenant. . . .

J.A. 664. The City made clear that it found overbroad the order to indemnify against all costs and attorney's fees. J.A. 666. Finally, at the urging of counsel for the NAACP, the Court advised that it would modify the affirmative requirements to condemn as contained in the August 2, 1990 Order which was then on appeal, and simply require the City to indemnify against any claims pertaining to title as they were asserted. J.A. 678 - 685.

Notwithstanding the course outlined on November 8 requiring a broad indemnification of all parties, including Deluxe, and the alternative course outlined at the hearing on November 29 whereby the City would no longer comply with some portions of the August 2 Order, the district court, *sua sponte*, entered a third order addressing indemnification on December 19, 1990. App. A-50. The Court wrote that HUD "has advised the Court that it will authorize execution of the Turnkey Contract of sale if the City of Yonkers (City) is required to reimburse HUD or the MHA for any financial loss that they incur due to defects in the title to the sites." App. A-50. The Court then further revised and restated the indemnity obligation as follows:

> Accordingly, it is hereby ORDERED:
>
> 1. That the City indemnify and hold harmless HUD and the MHA against any claims, causes of action, loss, damage, costs or expenses, including attorney fees, they sustain, directly or indirectly, as a result of defects in title to the Whitman School, School #4, Clark and Loring, Helena Avenue, and Wrexham Road sites, including any attorney fees or costs incurred in the defense or prosecution of any lawsuit or other legal proceeding arising out of any alleged defect in title to the said sites.

App. A-51.

The City appealed from the various Indemnity Orders on January 3, 1991. Appeal number 91-6022.

F. The Decisions Below.

The Second Circuit affirmed the district court's Title Orders, appeal no. 90-6257, on March 4, 1991. The court wrote that the appeal was due to be dismissed as barred by section 10 of the 1988 Decree. The appeals court rejected the City's contention that "section 10 bars only those appeals that challenge the City's basic obligation to provide sites." App. A-57. The court went on to find that the City had no right to appeal any district court

order involving the public housing sites — even an order denying a modification of the obligations contained in the consent decree:

> By its terms, section 10 also bars appeals from decrees that "relate[] to" the City's obligation. Requests to modify the City's obligation are, we believe, "related" to that obligation within the meaning of the provision. Accordingly, because this appeal challenges district court rulings insofar as they deny the City's requests to modify its existing obligations, it is barred by section 10 and must be dismissed.

App. A-57.

The appeals court rejected the City's other claims in its appeals from the Title Orders. It found that the district court did not abuse its discretion in refusing the City's request to make the transfer of sites subject to a right of reverter should the sites no longer be used for public housing, refusing to enter a finding of *pro rata* compliance upon transfer of the first five public housing sites, and imposing the affirmative duty to clear the encumbrances outlined in the August 2, 1990 Order. App. A-58, 59.

The appeals court wrote that the burden was on the City to take the actions necessary to make the sites "*acceptable* for . . . public housing," notwithstanding the language of the consent decree acknowledging that the HUD review process of the sites was not completed. App. A-59.

Following the appeals court's decision on the appeal from the Title Orders, the United States moved to dismiss the appeal from the Indemnity Orders, number 91-6022, as also barred by section 10 of the 1988 consent decree. The same panel of the Second Circuit granted the motion to dismiss, without comment, on March 19, 1991. App. A-62. The appeals court has not addressed the merits of the appeal from the Indemnity Orders.

REASONS THE WRIT SHOULD BE GRANTED

I. The Second Circuit's Decision That The City Has No Right To Appeal A Contested Modification Of The Consent Decree Is Contrary To The Important Policy That All Federal Courts Have Continuing Jurisdiction Over Injunctive Orders.

Section 10 of the 1988 consent decree provides that the City will not appeal further the district court's liability decision or "any subsequently entered decree," "to the extent it relates to the City's obligations to provide sites for the placement of 200 units of public housing . . . ." App. A-25. The appeals court's decision finding that the district court's orders which modified and expanded the basic obligation to provide sites is contrary to the plain language of the decree, the context of the litigation at the time of entry of the decree, as well as important policies governing the continuing role of equity in judicial supervision of injunctive orders.

A. The Plain Language of the Decree Permits An Appeal of Orders Governing A Modification.

It is axiomatic that the "scope of a consent decree is to be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Firefighters v. Stotts*, 467 U.S. 561, 574 (1984); *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971). The full text of section 10 of the consent decree provides:

> SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America, et al. v. Yonkers Board of Education, et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been

> prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

App. A-25. It is clear from this language that the City simply agreed that it would not pursue any longer an appeal of the basic obligation to provide sites for 200 units of public housing as mandated by the 1986 Housing Remedy Order.

The consent decree was entered on January 28, 1988. App. A-29. One month earlier, on December 28, 1987, the Second Circuit affirmed the district court's liability order, 624 F.Supp. 1276, the Housing Remedy Order, 635 F.Supp. 1577, and the School Remedy Order, 635 F.Supp. 1538. See, *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987). When the consent decree was entered, the City of Yonkers and the Yonkers Board of Education were within the 90 day period during which they would seek certiorari from this Court. After entry of the decree, the City could seek certiorari concerning any matter other than the court ordered duty to provide sites for 200 units of public housing. Indeed, limited review was sought but denied. *Yonkers Board of Education v. United States*, 486 U.S. 1055 (June 13, 1988).

The first part of the 1988 Consent Decree provided a set of procedures for implementation of the obligation to provide sites for the 200 public housing units.[7] That *obligation* was fixed by

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[7] Dissenting in *Spallone v. United States*, 493 U.S. ____, 107 L.Ed. 644, 663 (1990), Justice Brennan recognized the limited effect of section 10 on the public housing process:

> The Consent Decree reiterated the city's pledge to build the 200 required public units, identified the seven sites, and committed the city to a specific construction timetable. The city also promised to forgo any further judicial review of this aspect of the remedial order.

the 1986 HRO and affirmed an appeal. Section 10 simply provided that there would be no further appeal of that *obligation* to provide sites – even though the City still had the right to seek review by this Court. For that reason, the second sentence of section 10 provided that "if any subsequent appellate ruling . . . were to nullify . . . the City's obligation to provide such sites (as found by the court in the opinion above), the City would, nevertheless, be required by this decree on consent fully to discharge such obligations as set forth herein." App. A-25. The Second Circuit ignored the existence of that sentence.

The Court of Appeals turned the language of section 10 on its head. The court held that the City has no right to appeal any order that "relates to" the public housing sites. The court deleted the word "obligation" from the decree. The "relates to" language found in section 10 is clearly intended to narrow the scope of the City's waiver. The City agreed not to appeal the earlier orders of the district court and appellate court only to the extent that those orders "relate[] to the City's *obligation* to provide sites . . ." (emphasis added). The language is not intended to broaden the waiver to include any order that can be associated with the provision of the sites.

The two appeals below did not attack the basic obligation to provide sites. Rather, the City sought review of the district court's refusal to make the transfer subject to a right of reverter, the district court's orders requiring the condemnation by the City of newly-discovered off site restrictive covenants and easements, and the newly-imposed indemnity obligations that made the City an insurer of title and an indemnitor of all of the developer's costs involving alleged title defects. The appeals from those orders did not attack the obligation to provide sites and were permissible under the plain language of the decree.

The Second Circuit ruled in *United States v. Teamsters*, 905 F.2d 610 (2d Cir. 1990), that any waiver of a statutorily protected right to appeal must be clear and unmistakable before a claim of waiver may succeed. Such a rule has long been recognized. See, *Kane v. Roxy Theatres Corp.*, 63 F.2d 754 (2d

Cir. 1933), *cert. denied*, 289 U.S. 751; and, *Payne v. SS Tropic Breeze*, 423 F.2d 236 (1st Cir. 1970). Moreover, a consent decree is not to be liberally construed, but is to be interpreted strictly in accordance with its language and not its presumed purposes. See, *Sealy Mattress Co. of Michigan, Inc. v. Sealy, Inc.*, 789 F.2d 582, 585 (7th Cir. 1986), and cases cited therein. But the Second Circuit in this case took language that was at best ambiguous and construed it as waiving any right of appeal. The construction imposed by the appeals court is clearly contrary to the important policy that any waiver of a public interest such as the right to appeal must be strictly construed. *See also, Alliance to End Repression v. City of Chicago*, 742 F.2d 1007 (7th Cir. 1984) (a court will hesitate to assume that by signing a consent decree the government knowingly bartered away important public interests).

The appeals court interpreted the decree's language as prohibiting any appeal from an order relating to the public housing – even an order granting or denying a modification of the prior orders of the district court. Such an interpretation is contrary to the plain language of the decree, the context in which it was entered, as well as fundamental principles governing the continuing powers of federal courts to oversee injunctive orders.

B. The Second Circuit's Construction of the Consent Decree Is Contrary to the Continuing Authority of a Federal Court to Oversee Injunctive Orders and the Vesting of Authority By Congress in Appellate Courts to Review the Orders of District Courts.

The continuing authority of a federal court, exercising equitable powers, to oversee, modify, revise or dissolve injunctive orders is unquestionable. *Firefighters v. Stotts*, 467 U.S. 561 (1984); *System Federation No. 91 Railway Employees Dept. v. Wright*, 364 U.S. 642 (1961); *United States v. Swift & Co.*, 286 U.S. 106 (1932). It does not matter whether the injunction was entered after a litigated proceeding or on consent, or

whether or not the power to modify was reserved by the terms.[8] *Swift*, supra. The construction placed on the 1988 consent decree by the Court of Appeals conflicts with the important federal policy of the continuing power of the federal courts to oversee and modify injunctive orders a embodied in the decisions of this Court as well as Rule 60(b)(5) of the Federal Rules of Civil Procedure.[9]

In 1988, the district court entered a consent decree which was construed by the appeals court in 1991 as divesting the federal appeals courts of any authority to review district court orders involving the implementation or modification of the public housing process when the City elected to appeal. Such a consent order is contrary to public policy as well as the allocation of jurisdiction by the Constitution to Article III courts and the delegation of authority to oversee injunctive orders to the courts of appeals by 28 U.S.C. §§ 1291, 1292(a).

Congress has provided that the courts of appeals shall have jurisdiction from any orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, . . ." 28 U.S.C. §§ 1292(a)(1) (interlocutory orders) and 1291 (final orders). The provisions of the 1988 consent decree, rather than simply providing a waiver of the right of one party to pursue or reap the benefits of a then-pending appellate proceeding, have been construed to divest the federal appeals courts of authority to review at the request of the City any future decisions involving the public housing. The 1988 decree was not designed to have that sort of prospective application — as it is plainly contrary to federal law.

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[8] The need for such a policy is self-evident. Injunctive decrees, especially in the context of desegregation litigation, involve ongoing supervision and involvement by the court as the remedy process goes forward. For that reason, this Court has recently recognized that a less-onerous burden should be placed upon those seeking modification or dissolution in that context. See, *Board of Education of Oklahoma City Schools v. Dowell*, 498 U.S. ____, 112 L.Ed.2d 715, 727-729 (1991).

[9] See, *United States v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), vacated on other grounds, 456 U.S. 952 ("recognition of this power [to modify] is found in Fed.R.Civ.P. 60(b)(5)").

A federal court does not have the authority to increase, change or modify the jurisdiction allocated to it or other federal courts:

> "It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system . . . Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money. The choices fall in the legislative domain."

Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 n.28 (1978), *quoting*, *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181-182. See also, *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) (federal courts lack the authority to delegate the authority and duties of Article III courts to another). The district court cannot enter an order divesting the appeals courts of jurisdiction to review district court actions in supervising or modifying injunctive decrees. *LaBuy*, supra, (supervisory control by the courts of appeals over the district courts is necessary to proper administration of the federal judicial system); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (federal appeals courts have "supervisory power" to review proceedings of trial courts and to reverse judgments of such courts which the appellate court concludes were wrong).

While a consent decree's contractual aspects are among its most fundamental characteristics, and the authority of the court to enter the decree flows from the consent of the parties, the parties cannot purchase an injunction from a court of equity that is illegal, inequitable, violative of public policy or in conflict with the laws it is intended to enforce. *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986); *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961). The decision of the appeals court that the consent decree divests the City of any right to invoke appellate jurisdiction to review an order on a requested *modification* of the consent injunction is contrary to the notion that all federal courts, including the appellate courts, have the continuing duty and authority to supervise injunctive orders.

The expansive construction of the consent decree imposed by the court of appeals should be corrected by this Court. This matter warrants action by this Court not only to ensure that its jurisdiction over the Yonkers public housing process is preserved – as Article III requires – but also to ensure that federal consent decrees do not become procedural devices whereby district courts become the court of last resort in the oversight of consent injunctions.

II. The District Court's Refusal To Make The Transfer Of The Public Housing Sites Subject To A Protective Right Of Reverter Was A Clear Abuse Of Equitable Discretion.

The HRO and 1988 Decree required the City to provide sites for 200 units of public housing. App. A-9 and A-21. Indeed, the purpose of that requirement was to remedy the alleged discrimination found by the district court in its liability decision. 624 F.Supp. 1276. When the district court ordered the City to transfer title to the lands to the nonparty developer, the City raised legitimate concerns regarding the future security of lands worth millions of dollars. The City requested that the district court make the transfer subject to a right of reverter should the sites no longer be used for public housing. The district court's refusal to provide such protection was a clear abuse of the equitable discretion reposed in a district court in fashioning remedial orders.

The district court acknowledged that its power to enter a remedy is justified only to the extent that "the purpose of [its action] is to create two hundred units of public housing for the benefit of the City of Yonkers." J.A. 278. The district court may not deprive the City of this valuable real property if the ordered relief is not narrowly tailored to remedy the violations of law. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977) ("a federal court is required to tailor the scope of the remedy to fit the nature and extent" of the violation).[10]

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[10] See also, *United States v. City of Parma, Ohio*, 661 F.2d 562, 576 (6th Cir. 1981) "courts must carefully tailor the remedy in cases of statutory violations,

(Footnote continued)

The appeals court acknowledged that "in the normal case it might well be appropriate to determine the issue of future interests before execution of a turnkey contract of sale. . ." and alienation of title. App. A-58. The court noted that the federal courts, in the future, "have adequate equitable powers to remedy the situation" should problems arise. *Id.* Such a statement has no merit. Title has been transferred to a nonparty developer with full rights to utilize it under state law. The developer intends to mortgage the lands to a nonparty lender. The lender will have the usual panoply of remedies available in the case of the real estate developer's default — foremost among which is foreclosure.[11]

The City's proposal ensured that the sites are not lost in the event of Deluxe's default and that the MHA cannot alienate the sites for some other purpose. Indeed, the City's request for a reverter furthered the interests of the HRO while providing protection for the City.[12]

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limiting it to relief necessary to correct the violations"); *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 709 (2d Cir. 1979) (federal court is required to tailor the scope of a remedy to fit the nature and extent of the violation); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 145 (3d cir. 1977) (federal court must give "careful scrutiny . . . to assure that the relief granted is no broader than that necessary to remove the violation and its effects;" "the federal equitable remedy must cure the [violation] but the dosage must not exceed that necessary to effect the cure"); *U.S. v. West Peachtree Tenth Corp.*, 437 F.2d 221, 228-29 (5th Cir. 1971) (scope of federal court's orders must minimize intrusion in defendant's property interests); *Rodgers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc.*, 599 F.Supp. 79, 84 (E.D.N.Y. 1984) (federal court's equitable powers must be exercised so as to minimize interference and intrusion with defendant's property interests.)

[11] Indeed, the developer recently asked the MHA and HUD to permit assignment of the Turnkey Contract to the lender, with an acknowledgement of the lender's unrestricted right to foreclose in the event of default by Deluxe. The provision of such rights is directly contrary to the position urged by the United States and the NAACP to the courts below that the federal courts could take control of any foreclosure proceedings under the All Writs Act and ensure that the sites were not lost in the event of the failure of the developer.

[12] The City requested, in the alternative, that upon site transfer the district court enter a finding of *pro rata* compliance with the HRO. The district court refused this alternative request. App. A-58, 59.

The notion urged below that the purpose of the HRO can be furthered through exercise of federal judicial power under the All Writs Act is without merit. While the federal courts have the authority to enter orders in aid of their jurisdiction, that power is not unlimited. *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). The court may not impermissibly bind the vested property interests of nonparties. See, *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("judgment or decree among parties to a lawsuit resolves issues among them, but it does conclude the rights of strangers to those proceedings").

The order requiring transfer of the sites to a nonparty without adequate protection in the event of default by the nonparty was an abuse of the equitable discretion reposed in the district court when fashioning a remedy. If a district court is going to engage in real estate development by remedial court order, then the court should employ prudent principles governing real estate transactions in shaping its orders. That failure should be corrected by this Court.

III. The District Court Improperly Modified The Remedial Obligations Of The City Without Any Notice, Evidentiary Basis Or Findings Of Fact.

The district court expanded the remedial obligations of the City in its various orders without any prior motions by opposing parties, submission of evidence, or findings of fact.[13] At no time was an evidentiary submission made before the district court entered a modification of the duties imposed on the City.[14]

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[13] The duty to provide a form of title greater than that obtained in the condemnation proceedings required by the 1988 Decree first appeared in the July 24, 1990 Title Order. App. A-30. The court further expanded the duty to affirmatively condemn certain off site covenants in the August 2, 1990 Order. App. A-36. Finally, the district court imposed, *sua sponte*, new obligations on Yonkers that it indemnify other parties for any claims, including attorney's fees, during the November 8, 1990 hearing, App. A-43, and in the December 19, 1990 Order, App. A-51.

[14] This Court has held that if the express terms of a consent decree do not create a particular obligation, a subsequent order imposing that obligation cannot be justified as an enforcement, implementation or clarification of the consent decree. *Firefighters v. Stotts*, 467 U.S. 561, 574 (1984).

Generally, modification to remedial consent decrees is accomplished through motion pursuant to Fed.R.Civ.P. 60(b). See, *e.g., EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979); *Brown v. Neeb*, 644 F.2d 551, 560 n.17 (6th Cir. 1981). Modification requires a full hearing and a rendering of findings of fact. *E.g., United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes v. United States*, 342 U.S. 353, 357-58 (1952); *Brown*, 644 F.2d at 560. Indeed, the appeals courts have made clear that even where only implementation flowing from the "four corners" of a consent decree is involved, an evidentiary record is necessary. See, *New York State Association for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 36-37 (2d Cir. 1979); *Sarabia v. Toledo Police Patrolman's Association*, 601 F.2d 914 916 (6th Cir. 1979); *see also, Hughes v. United States*, 342 U.S. 353, 357 (1952); *Cook v. Birmingham News*, 618 F.2d 1149, 1152 (5th Cir. 1980) ("It makes no difference in our view, that the motion was framed in terms of 'clarification' rather than 'modification' "); *Hadix v. Johnson*, 712 F.Supp. 550, 552 (E.D.Mich. 1989) (evidentiary hearing on "motion to clarify"). In the exercise of its power to modify a consent decree, the district court should give the parties notice and an opportunity to be heard at an evidentiary hearing before revising their respective positions. *United States v. Western Electric Co.*, 894 F.2d 930, 282 (D.C.Cir. 1990).

The new obligations set forth in the district court's orders — that the City of Yonkers convey property free and clear of all easements and covenants, condemn certain private easements and covenants and indemnify the other parties — are modifications to the consent decree issued without hearing or any findings of fact. With regard to the 200 units of public housing, the HRO only requires the City "to provide acceptable sites for 200 units of public housing." App. A-9. Similarly, the consent decree only requires the City of Yonkers "to provide the [identified] sites. App. A-22. Neither document requires the City of Yonkers to condemn easements and covenants as part of its obligation "to provide" sites.

The district court failed to convene the required hearing and to make findings of fact necessary to justify the new obligations.

Even if the new obligations are construed to be an "implementation" of the decree, the new obligations are nevertheless invalid since the City did not receive its due process protection that must accompany such action. *See, New York State Association for Retarded Children, Inc.*, 596 F.2d at 36-37. As district courts increasingly have the duty to revise and modify ongoing injunctive orders, due process requires that appropriate and fair process precede such modifications. The district court's practice of continuous entry of *sua sponte* orders is contrary to fundamental notions of due process. The City believes this Court should make clear that all modification proceedings require notice and opportunity to be heard in a manner consistent with due process.

CONCLUSION

Petitioner City of Yonkers respectfully requests this Court to grant its petition for writ of certiorari, vacate the orders of the lower courts, and remand this cause for further proceedings.

Dated: May 31, 1991

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Intervenors,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third-Party Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party Defendants.

----------X

80 CIV 6761 (LBS)

HOUSING REMEDY ORDER

APPEARANCES: May 28, 1986

HONORABLE LEONARD B. SAND, U.S.D.J.

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SAND, J.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. *Injunction*

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. *Fair Housing Resolution and Office*

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair housing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable. The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for

the period, including any difficulties encountered in carrying out its responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such entities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability of rental management companies, brokers, local lending institutions and agents. To assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sales business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available

to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there. The affirmative marketing plans shall be consistent with the occupancy priorities provisions (¶ VII) of this Order.

6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment data, plans for housing and school program development and other information relevant to the remedial process is available to both the Board and the City.

7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private nonprofit agencies. The FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings

to enforce subpoenas issued pursuant to paragraph 3 hereof.

III. *Transfer of Section 8 Administration*

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

IV. *Public Housing Units*

The City has previously commited itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG") funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984-85 CDBG entitlement grant up to its full amount unless the City submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984-85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98-45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their

availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984 Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City submits all necessary documents, the City is hereby ordered to submit the required documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984-85 program year and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984-85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall advise within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (*e.g.*, in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately-owned sites listed by the Yonkers Planning Director as suitable for development of public housing).

Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and the owner under which the owner (or developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. § 941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. *Affordable Housing Trust Fund*

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds presently allocated by HUD to the City which minimum funding level may be diminished by 5 percent in each of the three succeeding years. In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their proposed development by providing the following incentives:

(i) write down of the site price of City-owned land;

(ii) finance surveys, market analyses and other similar pre-construction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. *Plan for Development of Additional Subsidized Housing*

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east or northwest Yonkers. In such Plan, the City shall be free to provide for the utilization of such private and public funding resources as are available to it including the Affordable Housing Trust Fund. The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing in such ratio (*e.g.*, 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, co-operatives; or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (*e.g.*, the willingness of the seller; approval of cooperative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan and the extent to which the construction or acquisition of the units in question will further the integrative goals of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. *Occupancy Priorities*

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. *City to Seek Available Financing*

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are currently available or which become available during the pendency of this Order.

IX. *Notice*

The City shall not grant any zoning chance or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. *Funding*

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. *Jurisdiction*

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States or plaintiffs-intervenors object to the dismissal. If such an objection is made with sufficient particularity, the Court shall hold a hearing on the dismissal motion, and the objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

Dated: New York, New York
May 28, 1986

/s/Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
YONKERS BRANCH-N.A.A.C.P, *et al.*,	)	80 CIV 6761 (LBS)
	)	
	)	Modification to
Plaintiffs-Intervenors,	)	Housing Remedy
	)	Order
v.	)	dated May 28, 1986
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
	)	
Defendants.	)	

Pursuant to my order of June 26, 1986, denying the Motion by the United States Department of Housing and Urban Development for Amendment of the Housing Remedy Order as to Paragraph 1 and granting the Motion as to Paragraphs 2, 3, and 4, the Housing Remedy Order of May 28, 1986 is hereby modified as follows:

1. Paragraph V. shall be amended to read:

> The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds allocated to the City in program years 1984-85, 1985-86, and 1986-87, which minimum funding level may be diminished by 5 percent per year in each of the succeeding years of this decree. . . .

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include at least 20 percent low and moderate income housing in their proposed developments, provided that the portion of the total development cost of each building that is borne by CDBG funds be no greater than the percentage of units in the project that will be occupied by low and moderate income persons, by providing the following incentives. . . .

2. Paragraph IV.B. shall be amended to read:

It is further ordered that within fifteen (15) days of the date that HUD approves the City's HAP, the City shall execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days of the approval of the HAP, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval of the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

Based on notification of an inconsistency by counsel for Yonkers, Paragraph IV.A. of the Housing Remedy Order is also modified as follows:

Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1986-88 program years and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP

and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1986-88 program years and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

SO ORDERED.

Dated: New York, New York
July 8, 1986

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
—and—	:	
YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,	:	
Plaintiff-Intervenor,	:	80 CIV 6761 (LBS)
—against—	:	
YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,	:	
Defendants.	:	

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	Maximum Density
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section hereof, setting forth an expanded list of sites and their respective "Maximum Densities", provided that the Maximum Density of no site shall be fewer than 12 units.

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* If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("REP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves

the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitaton set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP, referred to in Section 6 in a manner reasonably calculated to insure tht the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

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* The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligation as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Sections 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were

to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 25, 1988

Plaintiff,
The United States of America

By: /s/ Brian F. Heffernan
Brian Heffernan, Esq.

Civil Rights Division
U.S. Department of Justice
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

Attorneys for Plaintiff

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Attorneys for Defendants
The City of Yonkers and Yonkers
Community Development Agency

SO ORDERED:

/s/ Leonard B. Sand
Leonard B. Sand, U.S.D.J.

Dated: January 28, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
YONKERS BRANCH – NAACP, *et al.*,	)	80 CIV 6761 (LBS)
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Pursuant to this Court's May 26, 1986 Housing Remedy Order, the City is obligated to provide acceptable sites for the construction of 200 units of public housing on the east side of Yonkers. This obligation was further memorialized in the January 28, 1988 First Remedial Consent Decree in Equity, in which the City agreed to provide specific sites for the construction of that public housing. Among those sites are the five sites which are the subject of the first Request for Proposals ("RFP") advertised by the Yonkers Municipal Housing Authority – the Helena Avenue Site, the Clark/Loring Site, the Wrexham Site, the Whitman School Site, and the School 4 Site. On November 23, 1988, the City was ordered to make these sites available "at no cost for use by the developer selected by the Yonkers Municipal Housing Authority and approved by HUD to develop the housing units."

Pursuant to its obligations under the Consent Decree, the City of Yonkers initiated eminent domain proceedings against three of the five properties designated for public housing construction, which were privately owned – Helena Avenue, Clark/Loring and Wrexham. These State condemnation proceedings have run their appropriate course and title to these properties is in the hands of the City. Title to the Whitman School and School 4 properties is also in the City.[1]

The HUD public housing process for the first RFP has nearly run its course. Following advertisement of the first RFP, the Housing Authority chose Deluxe Development of New York, Inc. ("Deluxe Development") as the turnkey developer for the five sites, that choice was approved by HUD, and the HUD review process of the Deluxe Development proposal and has been completed. However, before signing of the turnkey contract of sale can occur, and public housing construction can begin, title to the five sites must be conveyed by the City of Yonkers to Deluxe Development.

The obligations of the City with regard to provision of property for public housing construction, as set forth above, are clear and undeniable. In light of the above, and the desire of the Court and the plaintiffs to see the beginning of construction of the long-delayed public housing, this Court below directs the City to convey good and marketable title to the five sites at issue to Deluxe Development immediately prior to signing of the turnkey contract of sale.

Almost four years have passed since entry of the Housing Remedy Order and, as this Court has recently noted, not one unit of housing has been produced as a result. That is about to change. The Municipal Housing Authority, HUD and Deluxe Development have expended numerous hours and considerable

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[1] The New York State Supreme Court orders of condemnation for these sites are attached as Exhibits 1A and 1B (Helena Avenue), 2 (Clark/Loring), and 3 (Wrexham). The boundary descriptions of the Whitman School and School 4 sites are attached, respectively, as Exhibits 4 and 5.

financial resources in the public housing design and review process, which finally had come to a close. The fruit of this labor — construction of public housing — is within reach. Because further delay of the public housing process is intolerable, and given the unfortunate history in this case of City foot-dragging and obstruction, inaction of the City in conveying title to the public housing sites cannot be allowed to impede the remedial process. Accordingly, this Court also provides in this Order for compliance with its mandates in the event of the City failure to comply with the order of conveyance.

Rule 70 of the Federal Rules of Civil Procedure is designed specifically for the situation where there is a failure to comply with a valid judgment of a federal court. Rule 70 reads as follows:

Rule 70. Judgment for Specific Acts; Vesting Title

> If a judgment directs a party to execute a conveyance of land or to delivery deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

If the City of Yonkers does not comply with the direction of this Court to convey title to Deluxe Development immediately prior to signing of the turnkey contract of sale, this Order puts in place an alternate mechanism for title conveyance so as to preclude interference with the public housing construction. Rule 70 provides this alternate mechanism, in the form of a judgment divesting the title of a party and vesting it in others, where the property in question is within the judicial district. All property involved in the first RFP process is in Yonkers and in this judicial district. Accordingly, this Order provides that, upon failure or refusal of the City of Yonkers to convey title as ordered, City title to the five public housing sites is divested and title is vested in Deluxe Development of New York, Inc., immediately prior to its signing of the turnkey contract of sale. The Court believes that such alternate procedure is necessary, and, if the City once again defaults on its remedial obligations, should suffice to accomplish the purposes of the Court in moving the remedial process forward.

Accordingly:

1) It is hereby ORDERED that, pursuant to the May 26, 1986 Housing Remedy Order, the January 28, 1988 First Remedial Consent Decree in Equity, and the November 23, 1988 Order of this Court, the City of Yonkers shall convey title to each of the five public housing sites which are the subject of the first RFP process – the Helena Avenue Site, the Clark/Loring Site, the Wrexham Site, the Whitman School Site, and the School 4 Site – to the turnkey developer chosen by the Yonkers Municipal Housing Authority, Deluxe Development of New York, Inc., immediately prior to signing of the turnkey contract of sale by Deluxe Development;

2) It is further ORDERED that if the City of Yonkers fails to convey title to each of the above-named properties as ordered above, pursuant to Rule 70 of the Federal Rules of Civil Procedure and effective immediately prior to Deluxe Development's signing of the turnkey contract of sale, City title to each of these properties is hereby divested and title to each of these properties is vested in Deluxe Development of New York, Inc., and this

judgment has the effect of a conveyance executed in due form of law;

3) It is further ORDERED that the City shall condemn any private easements or convenants inconsistent with the use of any of the above-named properties for public housing;

3(A) It is further ordered that the City shall convey title to the above named properties free and clear of any and all liens, encumberances and/or clouds on title.

4) It is further ORDERED that the conveyance or vesting as set forth herein shall be deemed by this Order to convey to and vest in Deluxe Development of New York, Inc. good and marketable title to each of the five above-named properties;

5) It is further ORDERED that the Yonkers City Manager and/or other appropriate City official(s) shall prepare and submit all documentation, and take all other actions, necessary to ensure proper recordation of the deeds of conveyance for the five above-named properties with the appropriate governmental authority. Failure to take any such actions shall subject the City, the City Manager and/or such officials to sanctions for contempt.

Dated: July 24, 1990
New York, New York

/s/ Leonard B. Sand

LEONARD B. SAND
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH – NAACP, et al,

Plaintiffs-Intervenors,

-against-

CITY OF YONKERS, et al.,

Defendants.

----------x

80 CIV 6761 (LBS)

ORDER

Copies Mailed to Counsel of Record

SAND, J.

The Order of this Court dated July 24, 1990 is hereby amended to delete the first two (2) lines of paragraph "5)" and to substitute therefor the following:

"5) It is further ORDERED that the City take whatever ministerial steps are necessary by its City Manager and/or other appropriate City official(s) who shall prepare and".

SO ORDERED.

Dated: New York, New York
July 31, 1990

/s/ Leonard Sand
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
and	:	
YONKERS BRANCH – NAACP *et al.*,	:	80 CIV 6761 (LBS)
Plaintiffs-Intervenors,	:	
v.	:	
YONKERS BOARD OF EDUCATION, *et al.*,	:	
Defendants.	:	

ORDER

Following the directions of the Court in the telephone conference between the parties on July 31, 1990, the City of Yonkers is hereby ordered to immediately undertake the following tasks to ensure that title to the five properties that will be transferred by the City for use in the construction of the first 142 units of public housing is clear of all liens, encumbrances, and/or clouds on title, and free of any private easements or covenants inconsistent with the use of any of the properties for public housing:

1. Provide HUD with evidence that the Quitclaim Deed issued by the School Board to the City for a portion of the School #4 property formerly called the Stillwell property has been duly registered with the County Clerk's office of Westchester County.

2. Change the City's tax records to indicate that title to the entire School #4 property now lies with the City.

3. Amend the incorrect map number for a portion of the School #4 property through the issuance of a correction deed (see Exception #13 in the School #4 title report prepared PFC Abstract).

4. Remove the restrictive covenants on those portions of the Whitman School site which are currently restricted to use only for single-family detached housing.

5. Demap the proposed street on the Helena site called St. George's Parkway.

6. Provide title reports to HUD on the three sites (Helena, Clark and Wrexham) which were taken by the City through eminent domain for the purpose of demonstrating that there are no liens, encumbrances, and/or clouds on title on these sites, and no private easements or covenants inconsistent with these sites' use for public housing which could prevent the construction of the public housing contemplated.

Should such liens, encumbrances, clouds on title, or private easements or covenants inconsistent with these sites' use for public housing be found, the City is to take immediate action to remove them, including, if necessary, the commencement of additional condemnation actions.

Dated: August 2, 1990
New York, N.Y.

/s/ Leonard B. Sand

Leonard B. Sand
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,
YONKERS BRANCH, NAACP, et al.,

Plaintiffs, 80 Civ. 6761

v.

CITY OF YONKERS, et al.,

Defendants.

----------x

November 8, 1990
1050 a.m.

Before:

HON. LEONARD B. SAND,

District Judge

THE COURT: I apologize for the delay in beginning. This Court entered an order on October 30 stating that we will hold a hearing on Wednesday, November 7, which has since been adjourned until today to deal with any and all outstanding matters dealing with implementation of the housing remedy order. All parties should be prepared to advise the Court at such time of the status of matters for which they have responsibility and with as much advance notice as possible to all parties to make such applications, if any, as they deem appropriate. Any party wishing a specific matter to be placed on the agenda for such hearing should advise the Court on notice to all parties in writing on or before November 6, 1990.

I have received no communications in writing in that regard. There are of course 2 aspects to the housing remedy order. That the public housing component with the 200 units of public housing to be constructed on sites which have been previously designated, and the affordable housing component.

* * *

THE COURT: We return then to the matter of the public housing. Mr. Heffernan, and others correct me if I don't accurately state the status of that. There have been, I am told, discussions among the M H A, HUD and Justice and deLuxe, the successful bidder for the construction of public housing units, and I am pleased to have been advised that a consensus has been reached with respect to some of the problems which were perceived and some of the provisions to be set forth in the contract.

And that it was also the consensus that rather than deal with the matters in an abstract fashion, it would be preferable for there to be prepared an actual contract which would address these issues, which I understand to be largely technical matters relating to staging and financing and things of that sort. So I have been requested by the parties to adjourn the proceedings insofar as they relate to the builder until Thursday of next week at 9:00 a.m. so that a contract can be prepared and initialed by the parties.

Is there anything else with respect to public housing?

MR. HEFFERNAN: Your Honor, that's an accurate assessment of where we are right now. One thing that we can deal with right now, at least the city can deal with right now, as you are probably aware from discussions with Mr. Newman, there have been alleged title problems which have arisen by the Whitman school site and on the Helena site for the public housing. The city has been made aware of these problems through its own title company, Mr. Coposa of P F C Abstract Company. I think it's appropriate for the court to request the city to immediately advise the Court as to what steps it has taken to clear up these title defects. The city is under order to provide the sites sand also to deal with any easements or any other problems to construction of the public housing. There certainly is no reason for another week's delay in any event on the part of the city to deal with these title defects, as ultimately they have to be cleared up.

THE COURT: I will hear you in a moment, Mr. DeRosa. My understanding of the matter is that it was the obligation of the city to deliver these properties free and clear of any encumbrances, so that that obligation has been the city's since the sites were designated and I believe that obligation is embodied in a prior order of this court. Mr. DeRosa, can you advise the Court what – my understanding of the title problems is they relate to 2 sites, Helena and Whitman, and they deal with some possible covenants which are of long-standing duration and which were not deemed of sufficient magnitude, for example, to interfere with the building of Whitman High School.

MR. DeROSA: That's right, your Honor. But I'm sorry because of the noise outside the courtroom, but let me just say that with respect to the issues on the covenants, I disagree a little bit. The background is that we do have an order with Whitman and clearing of restrictive covenants, the liens and encumbrances are in different paragraphs of order.

The R F P contention that it's the Housing Authority's responsibility to get a title report of the Whitman school, came over to the city from the school. This was only activated back in 8/8 of 90, when you wrote to the M H A asking for complete title information. We gave that in when we did. The Whitman restrictive covenant was picked up by you I believe in the summer. What happened was, you ordered us to remove it on 8/2 and essentially when 2 days we wrote to P F C, which is the title company. I don't know whose title company that is because they are dealing with some other parties but it was not obviously I don't think the city's obligation to have a title insurer per se.

In any event they said it was going to cost $76,000 to identify the parties necessary to clear that and that there were 1376 lots. Then we got to letter from P F C out of the blue to the city on October 12, informing them about the Mennonite case, which apparently my information is that was gotten from some discussions with some of the parties, HUD and possibly others. I say that with all due respect but we don't know, there have been discussions that the city was not privy to.

They said, in any event, it would cost them just to do the search itself to identify the people, $275,000 and it would take 8 to 12 months. That excludes any legal fees, condemnation costs, et cetera. That is one place where we are in terms of sending that to the emergency financial control board, et cetera.

THE COURT: I think one thing is clear, and that is apart from the question of title insurance and who issues it and what form it takes, it is the city's obligation to deliver free and clear title to these sites for the purpose of construction of the public housing. How the city goes about fulfilling who obligation is one question. But it should be clear that because it is the city's obligation, the city already required to indemnify and save harmless HUD, N H A or anyone else should there be any damages or costs, including legal fees, incurred by virtue of any of these problems. If the city with an awareness on the city's part that that is its responsibility, the city may then find it, that it has a greater motivation to either cause the removal of these restrictive covenants by condemnation proceedings or otherwise, or take such other actions or live with the liability. But if there is anyone who is entertaining the notion that the construction of public housing on these sites will be delayed the periods of time set forth in that estimate by the title company for that length of time for the removal of encumbrances so ephemeral that a high school which is built with taxpayers money on that site, that's obviously a false perception of what will occur here.

MR. DeROSA: Your Honor, if let me start at the beginning. Let me just go back again and say title to whom, first of all. And in what form? Because your Honor has just indicated that these might be ephemeral, but our indication is that HUD or some other party is insisting that these be removed. I don't think this is a situation in which the city is driving the need for this to be removed or not. I don't understand.

I understand your point to me about the city, but there are other parties in the litigation. As to whether this would be good

an insurable title where is something, I'm not privy to. These are what the title company has found. If they are acceptable in some fashion to someone else in that form—

THE COURT: We can't lose sight of what we are dealing with and the nature of what is going to be constructed on these sites and to whom title will be delivered. I think N H A has already agreed that it will—Mr. Heffernan, do you want to respond to Mr. DeRosa's statement.

MR. HEFFERNAN: Your Honor, I really don't know if I get the point. I mean, I think it's very simple. The Whitman site has been on the drawing board since May of 1986. The Helena site has officially been on the drawing board since the consent decree in June of '88. The city has to provide the sites. To us that clearly means it has to provide appropriate title so that the Housing Authority will eventually end up with the sites, will have sufficient title so that public housing is going to stay there and not be subject to whatever other suits may be brought by whomever to challange the title.

My whole point, your Honor, is that the city has been aware for a while that these problems exist. I understand that at least with regard to Whitman as of April 13 they were advised by title report that this problem was there. If the city doesn't want to be put under a schedule or whatever, that's fine, but I think they should understand that they are liable for whatever results from their inability to provide or their unwillingness to provide good title. I think that follows from the court orders that have been issued already. I think the Court has put them on notice that is the case. If that is not enough motivation at this point to get the city moving on getting these problems resolved, well, I guess that is something the city is going to have to live with.

THE COURT: I remember—yes, Mr. DeRosa.

MR. DeROSA: If I may, we may be talking at different cross purposes here. For the city to do what it is required, I take it is what we have addressed before. If someone wants title that

issues free and clear of these covenants, in order to take steps to reasonably comply, we need to get the information from a title company before the city can take any action. So to say that the city has no motivation or we can accelerate the process somehow, but when we go back to appropriate title again, meaning in this case for example, and we don't know and I tried to reach the title company, I don't know how much it's going to cost to condemn those covenants. If we have two-family homes and $250,000 and a one percent valuation in a state court for 1376 homes, it could be as much as 3 and a half to $4 million. If it's higher than that, it could be 35 million dollars. So we are at a little bit of a disadvantage.

THE COURT: I think a condemnation lawyer would be concerned about your making value estimates.

MR. DeROSA: What I am saying is the issue in terms of doing all that, what the city can could subsumes the fact that we have identified who they are of record—

THE COURT: All that I am saying, Mr. DeRosa, I understand, I have seen the correspondance. All that I want to make clear is that this is the city's problem. The city should proceed at whatever pays it deems appropriate. But the city should understand that it will be called upon to indemnify and save harmless HUD, M H A, the builder, or their successors for any costs and expenses, including legal fees, that may arise by virtue of these encumbrances.

Having that obligation and understanding that it has that obligation, the city may then, you know, it can deal with the problems of the title company but it should be understood that in dealing with the title company or dealing with anyone else on this subject, this is not going to be the basis for any delay in the construction of the housing on those sites. If we were dealing in a different context, if we were talking about, not to take an abstract question, building a high school on the site, if we were dealing with a commercial project and we were talking about building multi million dollar high rise projects on this

property, these nebulous covenants would not, in my view, and it's been a long time since I practiced real estate law, but there was a time when I did, would not long deter anyone.

But we are not dealing in that context. We are dealing in the context of United States against Yonkers. There is just one concept – therefore when you talk to the title companies which tell you that it would cost X dollars if if took 6 months or Y dollars if it took 9 months and with a great distress, I am sure that that caused some persons in the city government, it should be understood, 1, this is not going to deter the construction of the housing; and 2, any costs and expenses whether they are damages or legal fees or whatever arising by virtue of these covenants or occasioned by the cost of removing these encumbrances, are expenses to be borne by the City of Yonkers.

MR. DeROSA: I understand that problem, but I mean –

THE COURT: That's it.

MR. DeROSA: But there are issues that remain. To say the issue that remains in particular is whether or not the construction contract is to go and –

THE COURT: The City of Yonkers need not concern itself with that. All the City of Yonkers need concern itself with is the fact that it, the City of Yonkers, will be liable, I will say it again – I don't have to say it again. The difficulties or the problems that may exist with the builder, with the bank, with anyone else, are problems which Yonkers need not concern itself with.

Its obligation is very simple. That is either to deliver title free and clear of any and all encumbrances or to indemnify and save harmless those persons I previously identified for any costs or expenses which may be incurred by virtue of that. That's it.

Life for the City of Yonkers is quite complicated, but need not make it any more complicated, except to make clear to those

in the city who are involved in this process that there has not been found in the title problem the escape which will enable a protracted delay or inability with respect to the construction of the housing. If anybody wishes to submit an order embodying that, and feels that this is not sufficient, why, you may submit an order.

MR. DeROSA: I would say, first, I understand the concepts you have expressed, but I frankly just don't understand the mechanics of it. Because, for example, there may be alternative ways other than indemnification to have this problem handled. That depends really on the other parties to the litigation.

THE COURT: All you have to do, then, is to informally discuss with Justice and with HUD or whoever else, what it is that the city would propose in lieu of its indemnification.

MR. DeROSA: I didn't realize this was coming on. I was prepared to respond to Mr. Sussman. I have spoken with Mr. Sussman before and offered to sit down and meet with him and find out if they could tell me along the way what steps they project—

THE COURT: Don't worry about their problem. Don't worry about deLuxe's problem or deLuxe's bank's problem or HUD's problem. It's very simple. I am not imposing in this any new obligation on the—

MR. DeROSA: That I disagree with, your Honor. I would think an indemnification, but that relates to judgments against 4 other parties at least that you have mentioned but it's not contained in the housing order.

THE COURT: I think it flows logically and inexorably from the obligation previously imposed on the City of Yonkers to deliver these sites for these purposes.

MR DeROSA: Again, your Honor, I understand that. Just being very, very careful, the title itself is fine. These are ancillary

covenants on different areas of land. These are not anything on Whitman. So the city's title to that I don't think is in dispute.

THE COURT: I think that's a definition of title and clear title that I would have considerable difficulty with. You understand what the court's order is?

MR. DeROSA: I'm not sure I do, your Honor.

THE COURT: Well, what don't you understand?

MR. DeROSA: Are you ordering an indemnification procedure to be worked out by the parties?

THE COURT: I don't know what you mean by indemnification procedure. I am advising the City of Yonkers that it will be held responsible to indemnify and save harmless the parties I have identified from any and all costs and expenses, including legal fees, that arise by virtue of these covenants. I don't know what procedure you need for that. You are certainly free to sit down with Justice and HUD and see whether there is some other procedure or assurance that will be acceptable. But I think my order and direction is clear, and as I say, it is simply in my view an extension of the obligation which the city has had for some time to deliver these sites for these purposes.

MR. DeROSA: I understand, your Honor. Again, respectfully, my point is until I know what could happen under that kind of scenario and what expense there could be to the city, I am hard pressed to say that I agree with that. I disagree with that. If HUD has done what, if they are sued by –

THE COURT: I assume what we are dealing with is that somebody, you know, and again, you know, in different contexts one makes judgments as to probability of suit and whether it's worth anyone's while to bring such a suit in valuing, making an estimate of what such a suit would cost against the possible recovery. But we are not here – as I said, we are dealing with building a high school, we are not dealing with a

multimillion dollar commercial property. We are dealing in the context of United States against Yonkers.

I don't know how I can more clearly say for the tenth time, the obligation of the City of Yonkers will be to indemnify and save harmless, justice, HUD, M H A, deLuxe or some successors from any and all costs and expenses, including legal fees, incurred by virtue of the existence of these restrictive covenants. Short of defining what those terms mean, you are too experienced a lawyer to require me to do that, I think it should be crystal clear. If you are saying, does that mean if somebody sues deLuxe or HUD or M H A and says I have this — I am entitled under this restrictive covenant for a right of easement in the parking lot for the public housing that has been built and that affects any my easement, is it the City of Yonkers responsible for the cost and expenses by virtue of such a lawsuit, the answer is a clear yes. Anything further?

MR. DeROSA: Just again, your Honor, that would mean — what I am trying to say is, I will work with the other attorneys but I am not privy to the contracts —

THE COURT: Mr. DeRosa, how many times do I have to say this. What is in the contracts is irrelevant to the City of Yonkers.

MR. DeROSA: I'm not trying to be difficult, your Honor. I am just making a hypothetical. If such a thing happens a payment of so-and-so will go to HUD, to anybody in this transaction, we would be liable for that as well, if this was a result of these litigations?

THE COURT: You know, I have said it now so many times. If you don't understand what indemnify and save harmless means or from any on all costs and expenses, including legal fees and that that indemnification runs to justice, HUD, the M H A, deLuxe or any successors — if you don't understand that, I don't know what else I can say.

MR. DeROSA: And at the same time that continues that the city will comply, that is not an alternative to the city delivering the title you want.

THE COURT: The city has this exposure, this liability. What the city does to extinguish it or diminish it is a decision for the City of Yonkers to make. The City of Yonkers can decide whether the sums of money which the title company projects is necessary to extinguish these nebulous and ephemeral claims is an appropriate expenditure or whether the exposure is so minimal that Yonkers would be what in another context we call a self insurer.

MR. DeROSA: It's a alternative, then. I understand that, your Honor. I will talk with the other attorneys but I would like to say that if I have a problem after I get the record if I could write to the Court and indicate my misunderstanding or understanding. But I will try to work with the attorneys.

THE COURT: I want, please, for your benefit, in communicating to your clients and I realize that when one has collective bodies as clients, I have been in that position, it is not easy. There are 2 concepts. One, the existence of these title problems will not be a ground to delay, impede or prevent the construction of the public housing.

MR. DeROSA: I understand.

THE COURT: 2, the costs of either indemnification or the cost of extinguishing Yonkers' exposure under indemnification are the costs will be borne by the City of Yonkers. Obviously, if you wish to write to the Court I certainly will read what you write. But I do not think we are dealing with a very difficult concept. Anything further

MR. LaRIZZA: I think your Honor summed it up exactly. Mr. DeRosa is suggesting he wants to have discussions with HUD as to what kind of performance the city would have to provide; I think it's very simple. The HUD regulations –

THE COURT: I think discuss that with Mr. DeRosa.

MR. LaRIZZA: I don't think there is that much to discuss.

THE COURT: That may be. In which case it will be a short discussion. But I'm not going to preclude discussions nor do I want there to be any ambiguity about what the Court has ordered. Thank you.

We are adjourned to Thursday of next week at 9:00 a.m.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
and	)	
YONKERS BRANCH, NAACP, et al.,	)	Civil Action No. 80 CIV 6761 (LBS)
Plaintiffs-Intervenors,	)	
vs.	)	
YONKERS BOARD OF EDUCATION, et al.,	)	
Defendants.	)	

SAND, J.

ORDER

Execution of the Turnkey Contract of Sale for 142 units of public housing on the Whitman School, School #4, Clark and Loring, Helena Avenue, and Wrexham Road sites is imminent. In the course of the development process, a question has been raised as to potential defects in title to two of the sites, *i.e.*, restrictive covenants regarding Whitman School and a dedicated street regarding Helena Avenue. Other questions regarding title to the sites could possibly emerge prior to the completion of the public housing and its transfer from the Turnkey Developer to the Yonkers Municipal Housing Authority (MHA).

The United States Department of Housing and Urban Development (HUD), has advised this Court that it will authorize execution of the Turnkey Contract of Sale if the City of Yonkers (City) is required to reimburse HUD or the MHA for any financial loss that they incur due to any defects in title to the sites.

Pursuant to Section 2 of the First Remedial Consent Decree in Equity, the city agreed to provide the MHA with sites for the location of 200 units of public housing, including specifically all of the five above-named sites. At the November 8, 1990, and November 29, 1990, hearings, this Court stated that it regarded the City's legal obligation to provide the sites as including the requirement to deliver the sites free and clear of defects in title. The Court went on to state that although the City could decide how to address any alleged title defects, the City's obligation to provide sites free and clear of defects encompassed a responsibility to indemnify HUD and the MHA for any losses they sustain due to defects in title. As the Court stated, this is not a new obligation upon the City but one inherent in the prior orders of the Court.

Accordingly, it is hereby ORDERED:

1. That the City indemnify and hold harmless HUD and the MHA against any claims, causes of action, loss, damage, costs or expenses, including attorney fees, they sustain, directly or indirectly, as a result of defects in title to the Whitman School, School #4, Clark and Loring, Helena Avenue, and Wrexham Road sites, including any attorney fees or costs incurred in the defense or prosecution of any lawsuit or other legal proceeding arising out of any alleged defect in title to the said sites.

2. That the following documents are hereby marked as Exhibits "A" and "B" respectively, and are made a part of the record of these proceedings:

A. Letter dated December 14, 1990 from the Department of Justice by Brian F. Heffernan, Esq. to the Court;

B. Letter dated December 19, 1990 from Thomas R. deRosa, Esq. on behalf of the City of Yonkers to the Court, and proposed counter-order attached hereto.

SO ORDERED.

Dated: New York, New York
December 19, 1990

/s/ Leonard B. Sand
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 952—August Term 1990

(Argued January 17, 1991 Decided March 4, 1991)

Docket No. 90-6257

UNITED STATES OF AMERICA; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs-Appellees,

—v.—

YONKERS BOARD OF EDUCATION, YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants,

CITY OF YONKERS, NEW YORK,

Defendant-Appellant.

Before:

OAKES, *Chief Judge*,
CARDAMONE and WALKER, *Circuit Judges*.

Appeal from three orders of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, requiring defendant-appellant City of Yonkers to convey clear title to five sites designated for public housing, and to perform specific tasks to extinguish all restrictions or clouds on title that are inconsistent with the use of the sites for public housing.

Affirmed.

RAYMOND P. FITZPATRICK, JR., Birmingham, AL (J. Michael Cooper, Mason & Fitzpatrick, P.C., of counsel); Jamie A. Hastings, Corporation Counsel, City of Yonkers, NY (Eugene J. Fox, Special Counsel, of counsel), *for defendant-appellant*.

LINDA F. THOME, Washington D.C. (John R. Dunne, Assistant Attorney General, David K. Flynn, Brian Hefferman, of counsel), *for plaintiff-appellee United States of America*.

MICHAEL H. SUSSMAN, Goshen, NY, *for plaintiff-appellee Yonkers Branch, NAACP*.

Per Curiam:

This is yet another appeal by the City of Yonkers (the "City") from orders seeking to implement the housing remedy in a civil rights action initiated in 1980 by the

United States against the City and the Yonkers Board of Education.

BACKGROUND

After more than 90 days of trial in 1983 and 1984, the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, issued a decision establishing the City's liability for a pattern of intentional racial segregation in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). On May 26, 1986, the district court entered its Housing Remedy Order ("HRO"), obligating the City *inter alia* to provide acceptable sites for 200 units of public housing. *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1577, 1580-81 (S.D.N.Y. 1986). This court affirmed the district court's liability and remedial rulings "in all respects." *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

Shortly after this court's affirmance of the liability decision and HRO, the parties negotiated an agreement setting forth certain actions that the City would take to implement the HRO. This agreement was entered by the district court on January 28, 1988 as the First Remedial Consent Decree in Equity ("Consent Decree"). The Consent Decree identifies seven sites for the construction of public housing, obligates the City to acquire title by purchase or condemnation to those sites that were privately owned, sets a timetable for the project up to the commencement of construction, and commits the City

to adopt, within ninety days, a legislative package of incentives for local developers. We discussed the City's contumacious delay in implementing the incentive legislation in *United States v. Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd on other grounds sub nom. Spallone v. United States*, ____ U.S. ____, 110 S. Ct. 625 (1990).

In December 1988, the Yonkers Municipal Housing Authority ("MHA") issued a Request for Proposals ("RFP") from developers for the construction of public housing on five of the seven sites identified in the Consent Decree. As contemplated by the Consent Decree, the RFP provides for "turnkey" development of the sites: the City would convey title to the developer, the developer would obtain construction financing and build the housing, and, upon completion of the housing, the MHA would purchase the project from the developer. Deluxe Development of New York, Inc. ("Deluxe") was selected as the developer for the first RFP.

The present dispute arises out of three orders, entered on July 24, 1990, July 31, 1990, and August 2, 1990, relating to the five sites named in the RFP. The July 24 order requires the City to transfer the sites to Deluxe prior to the signing of the turnkey contract of sale, and further requires that title to those sites be free and clear of any defects. The July 31 order rejects the City's request for certain protection against the possibility that the sites someday cease to be used for public housing. The order also notes that the City is under an ongoing obligation to take corrective action with respect to any clouds on title. The August 2 order, among other things, requires the City to clear certain title defects prior to conveyance. The City argues that these orders impermissibly expand the scope of the City's obligations under

the HRO and Consent Decree, and therefore constitute an abuse of the district court's discretion. Because we believe that the City has waived its right to raise these arguments on appeal, and because we find the arguments to be without merit, we affirm.

DISCUSSION

Section 10 of the Consent Decree provides:

> The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision . . . entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F. Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree.

According to the City, section 10 bars only those appeals that challenge the City's basic obligation to provide sites. However, by its terms, section 10 also bars appeals from decrees that "relate[ ] to" the City's obligation. Requests to modify the City's obligation are, we believe, "related" to that obligation within the meaning of the provision. Accordingly, because this appeal challenges district court rulings insofar as they deny the City's requests to modify its existing obligations,[1] it is barred by section 10 and must be dismissed.

Even if section 10 did not bar this appeal, the district court orders would still have to be affirmed, because none of the challenged provisions constituted an abuse of the district court's discretion. *See United States v.*

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1 As discussed *infra*, we reject the City's attempts to characterize the orders as "expansions" of the City's existing obligations.

Yonkers Bd. of Educ., 837 F.2d 1181, 1236 (2d Cir. 1987) (discussing deference owed to district court's choice of remedy in racial discrimination cases), *cert. denied*, 486 U.S. 1055 (1988).

The City first challenges the district court's denial of the City's request for a possibility of reverter in the sites.[2] The City argues that it is entitled to this future interest in the sites as protection against certain contingencies—*e.g.*, Deluxe fails to build public housing on the sites or the MHA terminates the sites for public housing. However, while in the normal case it might well be appropriate to determine the issue of future interests before execution of a turnkey contract of sale, we do not believe that the district court's refusal to grant a possibility of reverter amounts to an abuse of discretion in this case. First, Judge Sand may, before the HRO is dissolved and the case dismissed, provide that any buildings constructed pursuant to the HRO be used only for public housing. Second, in the unlikely event that the City's fears are realized, the federal courts have adequate equitable powers to remedy the situation. Finally, Judge Sand had good reason to believe that granting the City's request would delay and/or jeopardize implementation of the HRO, which the court properly considered of paramount importance.

The next alleged abuse of discretion occurred when the district court refused to rule that, upon conveyance of title to the first five sites, the City was entitled to a *pro rata* release from its obligation to provide sites.

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2 A possibility of reverter is the future estate left in the creator or in his successors in interest upon the simultaneous creation of an estate that will terminate automatically within a period of time defined by the occurrence of a specified event.

N.Y. Est. Powers & Trusts Law § 6-4.5 (McKinney 1967).

Again, we believe the district court exercised its discretion prudently. There are numerous ways in which the City may still impede the construction of public housing. For example, the City could refuse to clear title defects, refuse to provide normal city services at the sites during and after construction, or refuse to issue occupancy permits when the housing is complete. Given the City's past record for obstruction, the district court was wise not to release it prematurely from its ongoing obligation under section 9 of the Consent Decree to "fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process" of constructing the housing.

Finally, the City argues that the August 2 order modifies the City's existing obligations by requiring the City to convey the sites free and clear of all encumbrances and clouds on title. However, to the extent that the City appeals the requirement that it identify and clear all encumbrances prospectively, prior to conveyance, the appeal is moot in light of the district court's order of November 29, 1990, which vacated that requirement. To the extent that the City challenges, as a modification of its obligations, the requirement that it defend against any suits arising from defects in the titles it conveys, such challenge is frivolous. The City is obligated under the HRO "to provide *acceptable* sites for . . . public housing"[3] (emphasis added). Sites that cannot be used for public housing because of title defects are, quite simply, not "acceptable."

Accordingly, the district court orders are affirmed.

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3 Similarly the Consent Decree requires the City "to provide the [identified] sites . . . for the location of . . . public housing."

MANDATE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit.

U.S.A. — No. 91-6022

v. — NOTICE OF MOTION

City of Yonkers — for Dismissal of this Appeal

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Linda F. Thome
U.S. Dept. of Justice/Appellate Sec./CRT Div.
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-4706 FTS 368-4706

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☒ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date: As early as week of 4/15/91

Judge or agency whose order is being appealed:
Judge Sand, S.D.N.Y.

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Raymond P. Fitzpatrick
Mason & Fitzpatrick, P.C.
100 Concourse Parkway, Suite 350
Birmingham, Alabama 35244
(205) 733-2600

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

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Brief statement of the relief requested:

This appeal should be dismissed. The United States respectfully requests that this motion be referred to the panel before which the City's previous appeal (No. 90-6257) is pending.

Complete Page 2 of This Form

By: *(Signature of attorney)* Appearing for: *(Name of party)*
/s/ Linda F. Thome United States

Signed name must be printed beneath
Linda F. Thome

Date
2/11/91

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appellee or Respondent:
☒ Plaintiff ☐ Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted

A TRUE COPY
ELAINE B. GOLDSMITH
/s/ Elaine B. Goldsmith
Clerk

March 20, 1991
ISSUED AS MANDATE:

/s/ James L. Oakes

/s/ Richard J. Cardamone

/s/ John M. Waches
Circuit Judge

(Constitutional and Statutory Provisions Involved)

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1

• • •

42 U.S.C. (1977) Fair Housing Act of 1968, as amended.

§ 3604. Discrimination in the sale or rental of housing

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful –

• • •

Fair Housing Act of 1968, as amended, § 804, 42 USC § 3604(1988)

• • •

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f) (1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of –

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes –

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. [;]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after the date of enactment of the Fair Housing Amendments Act of 1988 [enacted Sept. 13, 1988], a failure to design and construct those dwellings in such a manner that –

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5) (A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such

dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this title shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6) (A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 810(f)(3) of this Act [42 USCS § 3610(f)(3)] to receive and process complaints or otherwise engage in enforcement activities under this title.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this title.

(7) As used in this subsection, the term "covered multifamily dwellings" means –

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this title shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this title.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

(As amended Sept. 13, 1988, P. L. 100-430. §§ 6(a)-(b)(2), (e), 15, 102 Stat. 1622, 1623, 1636.)

* * *